

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.4789 OF 2013
IN
FIRST APPEAL NO.2860 OF 2007**

Balasaheb Arjun Magar .. Applicant

IN THE MATTER BETWEEN

Shri Kanhaiyalal Motilal Talera .. Appellant

Vs.

Sarubai Narayan Mulik
since deceased by legal heirs
1(a) Smt.Mathura Arjun Magar and Ors. .. Respondents

Mr.VA.Thorat, Sr.Counsel i/b Mr.V.S.Kapse for the applicant
Mr.Madhav Jamdar for the appellant

**CORAM : K.K.TATED, J.
DATED : 07/08/2015**

PC:

1 Heard the learned Senior Counsel for the applicant and the learned counsel for the appellant.

2 This application is preferred by respondent no.1b for setting aside the ex-parte judgment dated 29.10.2013 passed by this court (Coram: A.P. Bhangale, J.) in First Appeal No.2860 of 2007 on the ground that without service on the applicant and or giving any chance to argue the matter, this court has passed the judgment.

3 The learned Senior Counsel for the applicant submits that in the present proceeding, when the matter was on board for hearing at that time, Advocate Sumit Kothari appeared for applicant before this court and requested adjournment. He submits that this court has declined to grant any adjournment and proceeded with the hearing of the First Appeal No.2860 of 2007. Hence, judgment passed by this court is ex-parte judgment and that be set aside and matter be heard on its own merits.

4 The learned Senior Counsel for the applicant submits that in this proceeding, the appellant failed to serve the applicant after carrying out appropriate amendment in First Appeal i.e. after bringing legal heirs on record of the deceased respondent no.1 Sarubai Narayan Mulik. He submits that Advocate Sumit S. Kothari by letter dated 22.11.2013 informed to the applicant that though he appeared before the court but Vakalatnama duly signed by him was not filed. He submits that on the date of hearing, Advocate appeared before this court for applicant and requested to adjourn the matter. The contents of the said letter reads thus :

“This is to inform you that on 24th October, 2013, you instructed me to appear on behalf in the above mentioned matter where you are party Respondent No.1(b). You gave me Vakalatnama on the said day to file on your behalf. On the same day the matter was on the board in the Hon'ble High Court where I requested the Hon'ble Court to adjourn the matter to collect papers from you, but the Hon'ble Court refused to adjourn the matter.

On the same day I have returned you the Vakalatnama without filing, as I did not have any papers to argue the matter.”

5 The learned Senior Counsel for the applicant submits that this itself shows that no one appeared on behalf of applicant when the matter was decided by this court. The learned Senior Counsel for the applicant further submits that this court by order dated 9.10.2013 recorded that all the respondents are served except applicant Balasaheb Arjun Magar. He submits that by the said order dated 9.10.2013 this court granted hamdast to the appellant to serve the applicant Balasaheb Arjun Magar. He submits that the said service was not effected on the applicant and the matter proceeded ex-parte. Hence, the applicant has preferred the present Civil Application for setting aside the ex-parte judgment dated 29.10.2013 passed by this court by which the First Appeal No.2860 of 2007 was finally disposed off. The learned Senior Counsel on the basis of above mentioned submissions submits that this Hon'ble Court be pleased to set aside the ex-parte judgment dated 29.10.2013 in First Appeal No.2860 of 2007 and hear the matter on its own merits.

6 On the other hand, the learned counsel for the appellant vehemently opposed the present Civil Application. He submits that the Division Bench of this court by order dated 17.10.2008 expedited the hearing of the First Appeal and directed office to place the matter for final hearing on 19.11.2008. He submits that thereafter the matter appeared on board for final hearing. At that time, they learnt that the respondent no.1 Sarubai Narayan Mulik expired. Hence, Advocate on record for the appellant wrote a letter dated 7.4.2012 to the Advocate for the Respondent Sanjeev Gorwadkar calling upon him to furnish the names and addresses of legal heirs of deceased respondent no.1. He submits that it was specifically stated in the said letter that as per their

knowledge, the respondent no.1 survived by her only married daughter Mathura Arjun Magar, Residing at A-53, Erica, Magarpatta City, Hadapsar, Pune 411 013. He submits that neither Advocate for the respondent informed the names and addresses of legal heirs of deceased respondent no.1 nor confirmed whatever was stated by them in letter dated 7.4.2012. He submits that thereafter the appellant preferred Civil Application No.1969 of 2012 for bringing legal heirs on record of the deceased respondent no.1. He submits that the said application was allowed by the learned Registrar on 28.6.2012.

7 The learned counsel for the appellant submits that when the matter appeared before this court on 20.9.2013, this court directed the matter to be placed on board for final hearing on 30.9.2013 in view of the Division Bench order dated 19.11.2008. He submits that on 3.10.2013, Advocate appearing on behalf of original respondent no.1 submitted that the deceased respondent no.1 executed a will dated 6.9.1995 and bequeathed the property in favour of one Balasaheb Arjun Magar (Applicant) and Satish Gajanan Mulik (Respondent no.1c). It is also recorded in the said order dated 3.10.2013 that Advocate Mr.S.M.Gorwadkar representing Balasaheb Arjun Magar and Satish Gajanan Mulik waive service. On that date, matter was adjourned to 9th October, 2013 as part heard. Paragraph 3 of the said order reads thus :

“Mr.Godwadkar, learned Advocate for respondents representing Balasaheb Arjun Magar and Satish Gajanan Mulik waive service.”

8 Advocate for the appellant further submits that though the

Advocate Gorwadkar waives service on behalf of legal heirs of respondent no.1 they served the applicant by Registered A.D. Post on 10.10.2013. In support of this contention, the learned counsel for the appellant relies on the photocopy of A/D acknowledgement (pg 134). He further submits that this itself shows that the applicant was duly served and inspite of that he has filed the present application on a false statement that for want of service the impugned judgment passed by this court be set aside. He further submits that there is no dispute that applicant duly signed Vakalatnama in favour of Advocate Sumit Kothari.

9 The learned counsel for the appellant further submits that this Court (Coram: A.B.Bhangale, J.) in order dated 25.10.2013 in paragraph 6 and 7 specifically recorded that though the applicant as well as other respondents are duly served, no one appeared on behalf of them when the matter was called out. He mainly relied on paragraph 6 and 7 of the order which reads thus:

“6. Today, the submissions at the bar, advanced on behalf of the appellant as well as respondents are concluded but nobody appeared on behalf of added respondent No.1(b). One advocate Mr.Sumeet Kothari, appearing for respondent No.1(b) did not file his vakalatnama though he prayed for adjournment to advance submissions at the bar. He did not appear yesterday as well as today also when appeal is finally heard.

7. Under these circumstances, it is directed that on behalf of respondent No.1(b) Balasaheb Arjun Magar and Mathurabai Arjun Magar, no vakalatnama is filed, although they are served, pursuant to the amendment in the Memorandum of appeal. Under these circumstances, if at all Respondent Nos.1(a) and 1(b) wants to file their written

Submissions, if any, they may do so by 28/10/2013, as a last opportunity to participate in the hearing of this appeal.”

10 The learned counsel for the appellant submits that though the applicant was duly served and he was represented through his Advocate Kothari, applicant filed the present Civil Application with malafide intention for setting aside well reasoned judgment passed by this court on 29.10.2013. He further submits that one of the respondent Satish Gajan Mulik, respondent no.1c filed Special Leave to Appeal (Civil) No.737 of 2014 in the Apex Court challenging the judgment dated 29.10.2013 and that Appeal is pending for hearing and final disposal on its own merits. He further submits that applicant is a party in the said Special Leave to Appeal. On the basis of these submissions the learned counsel for the appellant submits that there is no substance in the present Civil Application and same may be dismissed with costs.

11 I have heard both the sides at length. The question arises in the present Civil Application whether the judgment passed by this court on 29.10.2013 in First Appeal No.2860 of 2007 can be termed as ex-parte judgment. Considering the order dated 25.10.2013 passed by this court and particularly paragraph 6 of the said order, it is crystal clear that the Advocate represented the applicant before this court and inspite of that he failed and neglected to argue the matter. Apart from these facts applicant in paragraph 10 of the Civil Application specifically stated that the Vakalatnama was given to Sumit S.Kothari Advocate who appeared in the matter on behalf of him. Portion of paragraph 10 of the Civil Application reads thus:

“10. Applicant submits that after receiving the intimation on 23.10.2013 about the hearing of First Appeal on the next day, Applicant sought advice of the local advocate Shri Gandharva Kawade, who advised Applicant to engage Adv. Shri G.S. Godbole. Accordingly Applicant instructed Shri Godbole to appear but upon instructions of Advocate Shri Godbole, the Vakalatnama was given to Shri Sumit Kothari, Advocate to appear in the matter on 24.10.2013 and to seek appropriated time to file the Vakalatnama and to seek instructions from Applicant and to obtain papers and to study the same before briefing Shri G.S.Godbole for making submissions.”

12 The applicant in paragraph 11 of the Civil Application stated as under:

“11. On 26.10.2013, Applicant therefore requested Adv.Shri S.S.Patwardhan to appear in the matter on 28.10.2013 and for requesting the Court to afford an opportunity to Applicant to put up his case. However, again on 28.10.2013, Shri S.S. Patwardhan refused to appear in the matter on the ground that his Senior Shri Y.S.Jahagirdar had represented Appellant in the matter and it was inappropriate for him to appear for Appellant. As a result, Applicant could not engage any lawyer to represent him at 11th hour which the First Appeal being heard.”

13 Bare reading of the Civil Application and particularly paragraph 10 and 11 shows that applicant had duly signed Vakalatnama and handed over to his Advocate to represent him in the present First Appeal and appeared when the matter appeared on board for final hearing, it cannot be termed as an ex-parte judgment. Apart from that respondent no.1c already preferred Special Leave to Appeal (Civil) No.737 of 2014 and it is still pending in the Apex Court for hearing and final disposal on its own merits.

14 Considering these facts, I do not find any reason to entertain the present Civil Application for setting aside judgment dated 29.10.2013 (wrongly stated as order in prayer clause (a) of the Civil Application) in First Appeal No.2860 of 2007. Hence, Civil Application stands dismissed.

(K.K.TATED, J.)